Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1937 (3)

SANGER-HARRIS, A Division of Federated Department Stores, Inc.,

Petitioner,

v.

ANN RICHARDS, Treasurer of the State of Texas,

Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
for the Fifth Circuit

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES Sanger-Harris, a Division of Federated Department Stores, Inc., Petitioner, by and through its attorney, Charles J. Sullivan, and files this Response to the Respondent's Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

CLARIFICATION OF FACTUAL CONTENTIONS OF THE PARTIES

A. The Petitioner has offered to make available for audit books and records of the Petitioner for relevant time periods.

Texas enacted its statute pertaining to the escheat of personal property in 1961, i.e., TEX. REV. CIV. STAT. ANN. Article 3272a (Vernon 1961). The Petitioner timely filed the reports required under Texas' escheat laws, which reports were accepted

as filed or not examined by the State of Texas. In 1986 the Respondent, citing Sections 71-75 of the Texas Property Code, which became effective September 1, 1985, requested permission to have an unlimited audit of the Petitioner's books and records, i.e., books and records back to 1961. The Petitioner declined to make available for audit its books and records for periods prior to September 1, 1981,[1] which fact the Respondent acknowledged in Paragraph IV of her declaratory judgment action filed on July 15, 1986 in the district court of Travis County, Texas.[2]

B. Other.

On July 28, 1986 the United States District Court for the Southern District of Texas — Houston Division denied a temporary restraining order/preliminary injunction in *Federated Department Stores* v. *Ann Richards*, Cause No. H-86-2759 filed on July 19, 1986 and issued its confirmatory written order on August 7, 1986. The Court thereafter dismissed Cause No. H-86-2759 on March 25, 1987.

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[1] The dormancy period under the Texas Escheat Act was seven years until September 1, 1985 at which time the dormancy period became three years. The decisions in *Southern Pacific Transport Co.* v. *Texas*, 380 S.W.2d 123 (Tex.Civ.App.-Houston 1964, writ ref'd) and *Shell Oil Co.* v. *Texas*, 442 S.W.2d 457 (Tex.Civ.App.-Houston [14th Dist.] 1969, writ ref'd. n.r.e.) established the rule of law that claims against a debtor that were barred by a statute of limitations shorter than the seven year dormancy period of the Texas Escheat Act were not subject to escheat to Texas for the reason that Texas' escheat claim against the debtor was unenforceable just as the original creditor's claim was unenforceable.

[2] The filing date reference to footnote No. 2 in the Petition for Certiorari in respect to *Richards* v. *Sanger-Harris*, No. 400,639, 126th District Court of Texas was incorrectly stated as October 3, 1986. The correct filing date is July 15, 1986.

PETITIONER'S RESPONSE TO RESPONDENT'S REASONS FOR DENYING WRIT

1. The Respondent seeks to ignore the due process guaranty of the Fifth Amendment.

The Respondent in her Brief in Opposition ignores:

1) the fact that it was the Respondent's actions that caused the absence of notice to the Petitioner and the denial to the Petitioner of an opportunity to be heard in respect to the remand motion; and

2) the due process consequences of the absence of notice to and opportunity for the Petitioner to be heard in respect to the remand motion.

The Respondent's election to avoid addressing the due process issue in her Brief in Opposition, is not dispositive of the due process issue. It constitutes an implied confession and avoidance, i.e., an admission that there is a problem and an attempt to avoid it under a "no new question" and a "no discretionary review" standard.

2. The issuance of a remand order upon the motion of a party without notice/hearing to the opposing party is a remand question not previously addressed by the Court.

The Respondent urges this Court to deny the petition for writ of certiorari on the grounds that no new question has been presented to the Court for resolution. The due process issue of absence of notice and the granting of a hearing to the opposing party in a removal/remand situation was not presented to or decided by this Court in *Ex parte Pennsylvania Co.*, 137 U.S. 451 (1890); *Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U.S. 336 (1976); *Volvo Corporation of America* v. *Schwarzer*, 429 U.S. 1331 (1976); or *Gravitt* v. *Southwestern Bell Telephone Co.*, 430 U.S. 723 (1977).

A non-resident defendant's statutory right to remove a case from state court is a substantial right and privilege to secure a presumably unprejudiced forum. *Heniford* v. *American Motor Sales Corp.*, 471 F.Supp. 328, 335 (D.S.C.-1979); *Marketing Showcase Inc.* v. *Alberto-Culver Co.*, 445 F.Supp. 755, 760 (S.D. N.Y. 1978).

The Respondent has not challenged the Petitioner's contention that the remand order was issued at the Respondent's request without the Petitioner having notice of the Respondent's remand motion or being extended an opportunity to be heard in respect to such motion. The Respondent has neither assumed, nor disclaimed responsibility for the unfair consequences of her failure to comply with the service requirement of FED.R.CIV.P. 5(a), but instead has adopted the position that the issuance of the remand order is a *fait accompli* which falls within the ambit of this Court's prior decisions in the *Pennsylvania*, *Thermtron*, *Volvo* and *Gravitt* cases.

The Respondent's "new question" argument does not address the question of the overriding effect of the Fifth Amendment's guaranty of due process. Since its adoption on December 15, 1791, the Fifth Amendment to the United States Constitution with its guaranty of due process has been a limitation applicable to every statute and a legal beacon relied upon by this Court in delineating permissible and impermissible conduct. The Respondent does not suggest that the due process requirement of notice and hearing in removal/remand cases is new. Instead the Respondent stresses the teachings of remand cases which did not involve due process notice and hearing questions.

The due process issue in this case is the fact that the Petitioner was not extended due process *at all*. The issue simply stated is "Was the Petitioner denied due process when the trial court terminated the removal of the case upon the motion of the Respondent who failed to give the Petitioner notice of the filing

of the remand motion and did not seek a hearing at which the Petitioner could be heard?"

The due process concerns in this case do not revolve around a "technical conception with a fixed context unrelated to time, place and circumstance" or the fashioning of flexible "procedural protections as the particular situation demands." *Joint Anti-Fascist Refuge Committee* v. *McGrath*, 341 U.S. 123, 162 (1951) (Frankfurter, J. concurring); *Cafeteria and Restaurant Workers Unions* v. *McElroy*, 367 U.S. 886, 895 (1961); *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972).

At some future date if the Fifth Circuit's decision remains unchanged, the courts may be confronted with questions as to whether there had been deception and an intentional failure to serve notice on the opposing party pursuant to FED.R.CIV.P. 5(a) on the premise that remand orders were not reviewable.

By her citation of *Matthews* v. *Eldridge*, 424 U.S. 319 (1976), the Respondent indicates her understanding that the Petitioner was entitled to notice and a fair hearing. It is not clear, however, how the Respondent can in a "mistake or inadvertence" situation[3], adopt a *fait accompli* attitude and cite as justification for her position rules developed in cases that did not involve a due process notice/hearing issue.

The question before the Court is not whether the failure to give notice and extend an opportunity for hearing is the result of intentional, inadvertent or mistaken conduct, but instead is whether a remand order issued at the behest of a party is fatally defective when notice to and an opportunity for the opposing party to be heard is absent. The latter question is new and has not been encompassed in this Court's prior decisions.

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[3] The Petitioner has accepted and acted upon the proposition that the false/incorrect certification as to service of the remand motion upon the Petitioner was the result of "mistake or inadvertence" and not the result of crafty trial tactics. *Heniford* at 338.

3. Discretionary review is not only appropriate but is essential to the on-going functioning of our legal processes.

The Respondent suggests that there is no special or important reason why this Court should exercise its discretion and grant its writ of certiorari.

The proper application of the due process guaranty in and of itself is a special responsibility. The guaranty is neither tentative nor discretionary. The guaranty is part of the fundamental fabric of our legal system.

The Fifth Circuit has held in this case that a constitutionally deficient remand order is not reviewable pursuant to the prohibitions outlined in the *Thermtron* case. It is important in light of the Fifth Circuit's decision that this Court exercise its supervisory jurisdiction to make it clear that the decisions in the *Pennsylvania, Thermtron, Volvo* and *Gravitt* cases did not exclude due process requirements from removal/remand cases or create a due process exception for removal/remand cases.

The due process issue in this case is not one involving the adequacy of due process at the state court level. The issue is whether the complete absence of notice to the Petitioner with the resultant denial to the Petitioner of the right to be heard in respect to the remand motion resulted in the denial to the Petitioner of a substantial statutory right and privilege, that is, the right, as a non-resident defendant, of having its case heard in a presumably impartial, unprejudiced tribunal. *Heniford* at 335; *Marketing Showcase* at 760.

Just as the non-resident Plaintiffs in the *Getty* case concluded that trial of their challenge to Texas' escheat laws would be best heard in federal court, the Petitioner, a non-resident defendant, determined that the resolution of its dispute with the Respondent about the Respondent's audit rights would be best accomplished in federal court. After the Petitioner elected to avail itself of its statutory right of removal, the Respondent, through

mistake or inadvertence failed to give notice to the Petitioner of the filing of the remand motion which placed in operation the judicial processes which resulted in the remanding of the case without the non-resident Petitioner being heard in respect to the removal/remand situation.

The failure by the Respondent to give the Petitioner notice of the filing of the remand motion accompanied by the trial court's action on such motion without giving the Petitioner an opportunity to be heard violated "the first principle of the social compact and of the right administration of justice." *McVeigh* v. *United States*, 78 U.S. (11 Wall) 259, 267 (1870).

The double lament of the Respondent that there has been delay in the resolution of the issue raised by the Respondent's declaratory judgment action and that "it is not time for the Respondent to have her day in court" ignores the fact that the problem arose because of the Respondent's false/incorrect certification that her remand motion had been served upon the Petitioner. The Respondent's *fait accompli* reliance upon the issuance of a remand order is not justification for excluding due process considerations from or for carving out a due process exception in a removal/remand case. Just as evidence obtained in a constitutionally deficient manner must be excluded to prevent the use of the "fruits of the agents' unlawful action", the remand order in this case obtained pursuant to a constitutionally deficient process should be reviewable and should be reversed. *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385, 392 (1920), *Wong Sun* v. *United States*, 371 U.S. 471, 484 (1963).

CONCLUSION

There can be no due process for a litigant in the absence of notice and an opportunity for a meaningful hearing.

This case should not be allowed to stand in its present form. If the Fifth Circuit's decision is allowed to stand without change or modification, the foundation will have been laid for future due

process attacks to the effect that since there is a known removal/remand exception to the due process guaranty, there must be other exceptions which are simply awaiting identification.

In situations involving improper practices there will be the unsavory problem of proving that the due process guaranty may have been compromised by fraud, deception, etc.

WHEREFORE, it is prayed that this Court exercise its supervisory authority, reverse the decisions of the Fifth Circuit and the trial court and require the trial court to conduct a hearing in respect to the remand motion.

Dated July 16, 1987.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that service of the Petitioner's Reply to Respondent's Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit has been made on opposing counsel by mailing a copy, certified mail, return receipt requested, to Mr. Jerry L. Benedict and to Mr. Patrick J. Wiseman, Office of the Attorney General, P.O. Box 12548, Austin, Texas 78711-2548 this 16th day of July, 1987.

Charles J. Sullivan

CHARLES J. SULLIVAN